

No. 83-6213

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

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CONNIE RAY EVANS,

Petitioner,

-v-

THE STATE OF MISSISSIPPI,

Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

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REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this brief reply to clarify two misapplied arguments first raised in the state's brief in opposition. Rule 22.5, Rules of the Supreme Court of the United States.

As its first reason for denying the writ, the state argues that petitioner failed to raise in the court below the question of the adequacy of the Mississippi rules concerning procedural default. It asserts that: "The jurisdiction of this Court to consider these rules is grounded upon questions of constitutional significance which have been adequately raised and considered in the State courts." Brief in Opposition at 7.

The Court has jurisdiction; the state simply misapprehends the nature of the case and of the first question presented. Petitioner is not raising a constitutional "claim" concerning the adequacy of state procedural rules under the due process clause. Compare Reece v. Georgia, 350 U.S. 85, 90 (1955).^{1/} Rather,

^{1/} As has been observed, "the Court has never asserted that it is necessary to find such a due process violation in order to consider the state requirement 'inadequate' as a bar to the presentation of a federal claim." Hart and Wechsler's The Federal Courts and the Federal System 546 (2d ed. 1973).

petitioner is presenting to the Court his constitutional claim concerning the administration of the Mississippi capital sentencing scheme in a manner that impermissibly considers race. This claim was raised below in the petition for writ of error coram nobis. The first question presented here only asks the Court to consider whether the Mississippi Supreme Court's reliance on its irregularly, inconsistently, and retroactively applied procedural default rule can serve as an independent and adequate state ground barring review by this Court of the underlying constitutional claim.^{2/} That question is properly raised in this Court for the first time because this is the first forum in which it is relevant.

The state also makes a passing suggestion in a footnote that the racial discrimination claim is not cognizable because petitioner failed to make an offer of proof below, as purportedly required by state court rules. Brief in Opposition at 9 n.

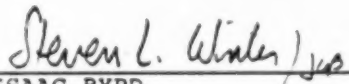
3. This argument must fail for two reasons. First, the Mississippi rules contain no such requirement. The nature of the Mississippi procedures do not allow for it: Under the Mississippi procedures, petitioner only files an application to the Mississippi Supreme Court for leave to file a petition for writ of error coram nobis in the trial court. Miss. Code Ann. § 99-35-145(2); Rule 38 of the Rules of the Supreme Court of Mississippi. Thus, he has not even reached the proper forum in which to make an offer of proof. The statute provides that, if the Mississippi Supreme Court requires additional information in order to consider the application for leave to file, it may order testimony from petitioner or the state. Miss Code Ann. § 99-35-145(4).

^{2/} See Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) ("Even though States are not free to avoid constitutional issues on inadequate grounds, ... they should be given the first opportunity to consider them."). Here, the state court was given the opportunity to pass on the constitutional claim. It avoided the claim on the basis of what petitioner submits is an inadequate state ground.

Second, even if the state law required such an offer of proof, which it does not, the court below did not base its ruling on this ground. This is made clear by a reading of the Mississippi Supreme Court's decision on this question, which is set out in full in the Brief in Opposition at 9. Thus, any purported procedural requirement of an offer of proof was waived in the court below.

For the foregoing reasons, the Court should grant the writ to consider the questions properly presented to it.

Respectfully submitted,



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